86-27

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM J. BENSON,

Petitioner,

vs.

ROBERT H. ALLPHIN and GEORGE T. RUMMEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can the court of appeals properly nullify Rule 50(b) of the Rules of Civil Procedure by allowing a defendant who forgets to move for a directed verdict at the close of all the evidence to move for judgment notwithstanding the verdict?

2. Was the right of public employees to be free from retaliation for their exercise of First Amendment rights sufficiently clear in 1976 to overcome a motion for judgment N.O.V. on the basis of qualified immunity especially where the district court had thrice rejected the Defendant's prior motions for summary judgment on that same basis?

3. Does the Seventh Amendment bar an appellate court from reversing a jury's verdict which the district court specifically found to be reasonable on the question of liability?

LIST OF PARTIES

The plaintiffs originally included, in addition to William J. Benson, Lorraine, Jerrald A. and Mark E. Benson. The defendants originally included, in addition to Robert H. Allphin and George T. Rummel, Dan Walker, Robert M. Whitler, Daniel J. Lenckos, John Gallagher, Phillip Mitchel, Robert Motto, George Diaz and William Troller. Walker is a former Governor of Illinois; Diaz and Troller are Illinois State Troopers. The other defendants are current or former employees of the Illinois Department of Revenue.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner WILLIAM J. BENSON (Benson) prays that a writ of certiorari issue to review the opinion of the Seventh Circuit Court of Appeals, which affirmed in part and reversed in part the district court's entry of a judgment notwithstanding the verdict in a civil rights action premised upon the First Amendment and 42 U.S.C. § 1983.

This proceeding involves the question of whether a public employee has the First Amendment right to expose corruption in a State Agency without suffering retaliation and harassment from his supervisors.

OPINIONS BELOW

The opinion of the Seventh Circuit is published at 786 F.2d 268; its order of April 11, 1986 is unpublished. Both its opinion and its order can be found at Appendix (App.) A and B respectively. The district court's decision can be found in Appendix C.

JURISDICTION

The Seventh Circuit's opinion was entered on March 10, 1986 (App. A). Benson's petition for rehearing was denied on April 11, 1986 (App. B). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

Seventh Amendment

. . . the right of trial by Jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

28 U.S.C., Rule 50(b)

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Introduction

The plaintiff, a former State employee, alleged in this section 1983 action (1) that, the defendant State officials of the ILLINOIS DEPARTMENT OF REVENUE (DOR) retaliated and harassed him and on June 24, 1976, discharged him in violation of his First Amendment rights and (2) that, after his discharge, the Defendants conspired to and did harass him in violation of his First Amendment rights.

The original complaint in this case was filed on October 6, 1977 (R. 1).* The district court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 and § 1343. The case proceeded to trial on Benson's Amended and Supplemental Complaint (R. 77) on October 12, 1983. On October 31st, 1983, the jury returned verdicts in favor of Benson and against ROBERT H. ALLPHIN (Allphin) on both counts. They awarded Benson a total of $353,000.00 in damages (R. 229A). A Rule 58 judgment was entered on those amounts.

1. The jury began its deliberations on Friday, October 28th, 1983 (R. 228; T. 1816). The following Monday, October 31st, Allphin attempted to present a motion for a directed verdict at the close of all the evidence, stating that he forgot to do so earlier. The district court stated that it would consider Allphin's motion in post trial proceedings, as the jury had advised him on the 28th that it had reached a verdict as to liability, but could not determine damages (T. 1816—attached hereto as Appendix D). On November 9th, 1983, Allphin was allowed to file a mo-

* R. represents the record on appeal; the number refers to each specific item. T. refers to the trial transcript.

tion for judgment notwithstanding verdict as well as a motion for a new trial (R. 236, 239) despite his failure to move for a directed verdict at the close of all the evidence.

2. Benson was employed by the DOR as a criminal investigator from 1971 until his dismissal on June 24, 1976. On November 1, 1974, Benson entered into a one-year written contract with the DOR to "undertake projects requiring personal and technical services as assigned by the DOR concerning its pending investigations." A similar contract was entered into on November 21, 1975, but this one expired on June 30, 1976, in order to coincide with the State's fiscal year. Both contracts were signed by Benson and Allphin and were terminable at will by either party upon written notice (A. 2-3; T. 103). It was both parties' understanding that Benson was to become a civil service employee upon expiration of the second contract (T. 103, 104). Both Allphin and defendant GEORGE T. RUMMEL (Rummel) confirmed that commencing July 1, 1976 Benson would be given civil service status (T. 106, 122).

Benson was initially assigned to assist in the enforcement of the Illinois Cigarette Tax Act, codified at Ill. Rev. Stat. ch. 120, paras. 453.1 to .22 (1975) and the Illinois Cigarette Use Tax Act, codified at *id.*, paras. 453.31 to .51 (referred to collectively as the "CTA")* at the Illinois-Indiana border. Benson lived in South Holland, Illinois, which is not far from the Indiana border; he worked out of the squad room at 180 North LaSalle Street in Chicago with the other DOR investigators. Benson was also in-

* Both acts have now been consolidated as the Illinois Cigarette Use Tax Act, codified at Ill. Rev. Stat. ch. 120, paras. 453.1 to .67 (1984).

volved in the enforcement of laws relating to retailer occupation taxes, motor fuel oil taxes, as well as bingo and lottery activities (A. 3).

The CTA Enforcement Program And Its Consequences

After assuming the position of Director of the DOR in March, 1973, Allphin adopted a policy of arresting CTA violators and confiscating their vehicles. Benson and his partner, JAMES KELLEHER (Kelleher), were involved in the enforcement of this policy. In fact, Benson stored many of the seized vehicles in his personal garage pending their removal to the DOR.

Benson made numerous arrests under Allphin's program. He also took photographs of individuals allegedly violating the CTA (A. 3). These photographs included, *inter alia*, pictures of Chicago police officers, firemen and other city, county, State and Federal employees who were allegedly violating the CTA (T. 491, 492). Although Benson was not reimbursed for these photographs, he did submit the photographs to his supervisors, while retaining the negatives (T. 491-92).

In April, 1974, the DOR was enjoined from enforcing the CTA against individuals bringing cigarettes into Illinois for their own use (T. 109). Despite that injunction, Benson and Kelleher were ordered to continue their enforcement activities (T. 112-13).

Several of those arrests led to the filing of civil rights lawsuits in federal court against Benson, Kelleher, Allphin and other DOR employees; Benson was a defendant in four of those suits (T. 226-29).

In addition to those suits in December, 1975, the DOR became embroiled in a contempt proceeding in the Circuit Court of Cook County to determine whether the 1974

injunction order had been violated by certain DOR personnel (T. 525). Judge DONALD J. O'BRIEN (Judge O'Brien) ordered the DOR to produce in court all data and records concerning enforcement of the CTA (T. 529). The DOR made the representation to Judge O'Brien that all records were being produced (T. 532).

On January 28, 1976, Allphin, Benson, Kelleher and several other DOR personnel were adjudged to be in contempt of court for violating the April, 1974, injunction order (T. 197). For some inexplicable reason, Benson's direct supervisor, MICHAEL J. BERRY (Berry) was not included in the contempt finding.

Benson's First Amendment Criticisms

Benson had been ordered not to enforce the CTA against public employees, especially Chicago police officers. Benson criticized this discriminatory practice and had numerous discussions on this subject with his co-workers, his supervisors and with Allphin and Rummel (T. 118-19, 121-22).

Benson also criticized, within the DOR, the bizarre manner in which certain motor fuel oil and sales tax cases were compromised; it appeared that certain cases had been settled for unacceptably low amounts in exchange for bribes to DOR employees (T. 168-170). Allphin and Rummel had ultimate authority over such settlements (T. 174).

Benson Is Isolated From Co-Workers

Benson was extremely upset about being held in contempt on January 28, 1976. He telephoned Allphin at home that night and once again voiced his criticisms about corruption in the DOR. He cited specific cases in which tax liabilities were compromised by DOR agents. He also told Allphin that the DOR had not produced all the rec-

ords as ordered in the contempt proceeding, especially his photographs (T. 125-130); he told Allphin that he had the negatives to all those photographs (T. 496).

As a result of that conversation, Allphin ordered Benson not to report to the Chicago office and not to discuss any of his allegations with anyone. He was to report directly to Allphin and Rummel (T. 148-49). Benson did as he was told, providing Rummel with the same information he had previously given Allphin (T. 158).

Benson Goes To The News Media

Believing he was helping Allphin and Rummel clean up the DOR, Benson met with reporters from the *Hammond Times* and the *Chicago Tribune* in February or March, 1976. He provided them copies of his photographs depicting policemen and other public servants purchasing cigarettes in Indiana (T. 162, 185). He discussed the corrupt compromising of tax cases (T. 187-88). Several stories appeared in the newspapers as a result of this information.

Neither Allphin (T. 197-200) nor Rummel condoned Benson's communications with the press. Benson was threatened with dire consequences if he repeated such contacts.

Benson Gets The Whistleblower Treatment

From that point on, Allphin and Rummel made a concerted effort to silence Benson and to get his negatives. They did so by duping Benson into believing that he was helping them clean out the DOR. RICHARD DUNN (Dunn) was hired by Allphin on April 15, 1976, to coordinate those efforts and to neutralize Benson (T. 348, 291-396).

Although Benson discussed each of his allegations with Dunn, Dunn's report made no mention of any of those

cases (T. 323). Instead, it painted a picture of Benson as an unreliable confidential informant who was threatening to extort a job from the DOR by revealing false stories about Allphin and Rummel.

The defendants maintained that position throughout the pre-trial and trial stages of this litigation. They denied Benson was ever an employee, denied he ever made any arrests, or revealed any information to the press prior to his discharge. The defendants did not change their tune in this regard until after the jury resoundingly rejected their factual position.

On May 27, 1976, Dunn contacted the INTERNAL REVENUE SERVICE (IRS), requesting copies of Benson's income tax returns (T. 343-46). Dunn had never requested anyone else's returns (T. 347). Benson was subsequently audited by the IRS for 1976.

In about the first week of June, 1976, Allphin told Benson that if Benson revealed any information about anything Benson had uncovered while he was a DOR investigator, Allphin would see to it that Benson was sent to jail for two years for committing perjury. Rummel repeated that same threat in a telephone call Rummel placed to Benson's home within a week of Allphin's threat (T. 216-217). The alleged perjury occurred during the *O'Leary* contempt proceeding in December, 1975 (T. 218-221).

Benson Is Discharged By Allphin And Rummel

Benson was becoming increasingly concerned about the progress of the investigation. Dunn had taken his badge away and Benson was worried that Allphin and Rummel were not going to follow through on their promise of a civil service job. Benson telephoned Allphin at Allphin's Springfield office on June 24, 1976 (T. 223).

Benson wanted to know what was happening with Dunn's report. He again discussed the various cases and the selective enforcement. He told Allphin that these improprieties had not stopped even though Rummel and Dunn were investigating the matters (T. 224).

Benson ran through each and every case with Allphin and Allphin said they would be taken care of. Allphin also repeated his threats about the perjury charges if Benson revealed any information (T. 224).

According to Dunn, Benson threatened to publish the pictures if he was not given an extension of his contract. Defendant Allphin, however, testified that no threats were made by Benson during that conversation (T. 551).

Benson's contract was terminated on June 24, 1976; Benson first learned of it on June 25th when he received a mailgram to that effect (T. 225).

The Retaliation Continues After Discharge

Benson continued to exercise his First Amendment rights after his discharge. On July 21, 1976, he submitted an Affidavit to Judge O'Brien setting forth the enforcement improprieties in the DOR. Benson also revealed that the DOR had, pursuant to instructions from Allphin and Rummel, altered and destroyed documents which the Judge had ordered produced in the 1975 contempt proceeding (T. 222, 232; Plaintiff's Exhibit 2). Benson also continued to talk to the press about those matters (T. 232). A second contempt proceeding was instituted against Allphin and other DOR personnel.

Meanwhile, Benson was still a defendant in four of the civil rights cases pending in federal court. On September 2, 1976, the Attorney General notified Allphin and Rummel that he was withdrawing his representation of all

DOR defendants (T. 229). See *Benson v. Scott*, 734 F.2d 1181 (C.A. 7, 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 435 (1984).

After the Attorney General withdrew, all of the DOR defendants except Benson were provided with substitute legal representation upon the authorization of Allphin and Rummel (T. 230). Benson had to represent himself in those cases for a period of time (T. 226).

When the article by Thomas Inkley appeared in the *Hammond Times* in August, 1976, Allphin became extremely upset (T. 352). Dunn then sent a letter to the Social Security Administration dated August 2, 1976, informing them about Benson's disability situation and attempting to get them to investigate it (T. 353). The letter was sent out when the articles came out; Dunn denied any connection between the two (T 357).

In addition to being forced to represent himself in the cigarette tax cases (T. 226), Benson lost at least the six days pay he would have received pursuant to this contract as the direct result of its termination by Allphin (T. 230). He also was not given an extension of his contract nor a civil service job (T. 230).

Benson went into a state of depression after receiving the mail-o-gram from Allphin (T. 1600). His firing aggravated his encephalitis and he suffered from increased seizure activity (T. 1600).

Benson had to make more frequent visits to his doctor and even had to receive treatment from a psychiatrist. Benson was still suffering from depression at the time of the trial (T. 1600-1601).

Benson has never been charged with perjury as a result of his testimony in the 1975 contempt proceeding (T.

232). He has never been charged with any criminal activity stemming from his days at the DOR.

He was audited by the IRS for 1976 and is currently engaged in civil litigation with the Department of Health and Human Services concerning his disability payment. The U.S. Attorney's office declined to prosecute that case as urged by the defendants herein.

3. Allphin filed a motion for judgment notwithstanding the verdict and a motion for a new trial on November 9, 1983 (R. 236, 239). The district court granted the former motion on June 14, 1984 (R. 280A; App. C). It did not specify what its disposition was of the motion for new trial. It also did not offer Benson a remittitur.

The court found that the jury's verdicts as to liability were reasonable but that its damage awards were excessive. The district court wrote that in its opinion:

> a fair and adequate award to Plaintiff should not exceed $50,000 plus his attorney's fees. From what the Court knows of this case and of Plaintiff's claimed damages, we believe both parties should accept this as a fair settlement award. THEREFORE, THE JURY'S VERDICT ENTERED IN THIS CASE ON OCTOBER 31, 1983, IS VACATED AND SET ASIDE AND JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT AS A MATTER OF LAW. Alternatively, if both parties waive appeal, a consent judgment will be entered in favor of Plaintiff for $50,000 plus attorney's fees and costs. (emphasis supplied).

(R. 280A; C. 7). The court of appeals, while at a loss to justify the district court's disposition of the post trial motions, reversed in part the judgment notwithstanding verdict and granted a new trial to Allphin on both the issues of liability and damages despite the district court's specific finding that the jury's liability verdicts were reasonable.

REASONS FOR GRANTING THE WRIT

1. The Court must exercise its supervisory power to correct the lower court's nullification of the mandate of Rule 50(b) of the Rules of Civil Procedure. Both the district court and the Seventh Circuit allowed a defendant who simply forgot to move for a directed verdict at the close of all the evidence, to move for judgment notwithstanding the adverse verdict reached by the jury.

The Rule however, is that where a party fails to renew their motion for directed verdict at the close of all the evidence, their right to move for judgment notwithstanding the verdict is considered waived. Such a motion cannot be granted unless a motion for directed verdict was made at the close of all the evidence. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018 (C.A. 5, 1979). The court of appeals recognized that this was the rule. (A. 10) It further recognized that:

> . . . It would stretch the notion of liberal construction of the Federal Rules beyond recognition to conclude that Allphin was in compliance with the letter of the rule when he offered a directed verdict motion after the jury had initiated its deliberations and had reached an informal verdict on liability.

A. 9-10, n.6; and see App. D.

Despite its recognition of the Rule, the court of appeals found that there had been no waiver because Allphin's motion was based upon qualified immunity, a strictly legal issue (A. 12). In so doing, the court allowed Benson to be prejudiced by a defense which was raised for the first time by Allphin in his post trial submissions and which defense was totally incongruous with the factual position

Allphin had maintained from the day he discharged Benson in June, 1976, until the jury resoundingly rejected his pretextual reasons.

Allphin and Rummel had moved for summary judgment on the basis of qualified immunity three times prior to trial and once during the trial. The confidentiality statutes were not mentioned in those motions. The district court rejected that defense on July 16, 1982 (R. 138), on April 5, 1983 (R. 167) and during the trial itself (R. 217).

In one summary judgment motion, the defendant submitted various affidavits asserting that Allphin, at the time he decided to terminate Benson, did not know of and thus could not have been motivated by Benson's disclosures to the press and various law enforcement officials. See *Benson v. Allphin*, 544 F.Supp. 464 (N.D. Ill., 1982) at 470. The defendants maintained that position throughout the trial.

Both the district court and the court of appeals allowed the qualified immunity defense as presented by defense counsel in their post trial brief (R. 239). It was there, for the first time, that defense counsel raised the confidentiality statutes as the basis for a qualified immunity defense. For eight years prior to that submission, the defendants had contended that Benson had never been an employee of the DOR and had never revealed confidential information prior to his termination. They should not be rewarded with qualified immunity on the basis of false pleadings.

One of the primary purposes of Rule 50(b) is to give the opposing party the chance to ask the trial judge for leave to repair the deficiencies in his proof before the evidence is closed. *McKinnon v. City of Berwyn*, 750 F.2d 1382, 1388 (C.A. 7, 1985). If Allphin would have raised

the confidentiality statutes as a basis for Benson's discharge, Benson would have been able to go forward with evidence to establish that such a position was diametrically opposed to the concocted defense that Allphin had been preparing against Benson since January 28th, 1976.

The Seventh Circuit had advocated a flexible approach to the waiver rule. *Bonner v. Coughlin*, 657 F.2d 931, 938 (C.A. 7, 1981). Its practice in this case, however, has had the effect of nullifying Rule 50(b) entirely.

As in *McKinnon*, Allphin's belated introduction of the confidentiality defense came far too late to afford Benson the opportunity to introduce evidence on this issue. 750 F.2d at 1389. The circumstances of this case did not warrant application of the flexible approach.

They certainly did not warrant complete nullification of Rule 50(b). In these circumstances, this Court must exercise its power of supervision by granting the writ and by ordering Rule 50(b) reinstated in this case. Allphin's motion for judgment notwithstanding the verdict should have been and must now be denied on the basis of his failure to renew his motion for directed verdict at the close of all the evidence.

2. In holding that Allphin and Rummel were entitled to qualified immunity as to Benson's in-house expressions and his disclosures to the press prior to his termination, the Seventh Circuit's opinion is in conflict with this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) and their progeny.

The Seventh Circuit was simply incorrect in its conclusion that it was an open question whether on-the-job expressions of public employees were entitled to Constitu-

tional protection until this Court's decision in *Givhan* in 1979.

The decisions of this Court prior to *Givhan* do not support the conclusion that private criticism was not protected until 1979. While *Pickering*, *Mt. Healthy* and *Perry v. Sindermann*, 408 U.S. 593 (1972) arose in the context of a public employee's public expression, the rule to be derived from those cases is not dependent upon "that largely coincidental fact." *Givhan*, *supra* at 439 U.S. 414.

The rule is that the right of public employees to be free from retaliation for their exercise of First Amendment rights has been clearly established at least as early as *Pickering*, *supra*, 391 U.S. 563 (1968). The First Amendment violations in this case took place in 1974-1976. It has been settled law for at least 15 years that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-606 (1967); *Connick v. Myers*, 461 U.S. 138 (1983).

Givhan recognized that the law concerning public employees' private expressions had already been clearly established prior to its decision. The First Amendment forbids abridgment of the freedom of speech. Neither the Amendment itself nor any of this Court's decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his or her views before the public. *Givhan*, *id.*, at 439 U.S. 416-17.

The Seventh Circuit itself recognized that private statements made by public employees were entitled to First Amendment protection. *Hostrop v. Bd. of Junior College District No. 515, Etc., Ill.*, 471 F.2d 488 (C.A. 7, 1972);

Muller v. Conlisk, 429 F.2d 901 (C.A. 7, 1970). It also recognized in a related case, that public employees have had the right to First Amendment protection at least since *Pickering, supra. Benson v. Scott*, 734 F.2d 1811 (C.A. 7, 1984); *cert. denied*, 105 S.Ct. 435.

Despite this clear cut rule and its recognition of the rule in previous cases, the court below inexplicitly concluded that Benson's in-house expressions were not clearly protected in 1976; therefore Allphin and Rummel were entitled to the qualified immunity defense.

The only relevant consideration in determining whether Allphin and Rummel were entitled to qualified immunity is whether Benson's First Amendment rights to in-house expression were clearly established in 1976. The State confidentiality statutes are irrelevant to this determination. *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 3018 (1984); *Benson, id.*, at 734 F.2d 1181; *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Benson's disclosures to the press prior to his termination were also clearly protected in 1976. There is no dispute that Benson was speaking out on matters of public concern. Such speech occupies the HIGHEST RUNG of the hierarchy of First Amendment values and as such, is entitled to special protection. *Connick v. Myers, id.*, at 103 S.Ct. 1689. This Court has recognized for the past twenty-two years that such speech is the essence of self-government. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

In denying Allphin's motion for directed verdict at the close of Benson's case, the district court ruled:

> In other words, I think there can't be any question but that Mr. Allphin was aware of the First Amendment rights, which is a requirement of *Harlow*

> *v. Fitzgerald* before any liability can affix itself to the defendant and, secondly, that a reasonable jury could make an inference that the reason for the discharge or the termination was related to and was because of the exercise of Mr. Benson's First Amendment rights . . .
>
> . . . I also think Mr. Spiegel has enough evidence in the record to show that the post termination actions of Mr. Allphin and his subordinates were sufficient to raise a reasonable inference that Mr. Benson was being punished or retaliated against for the exercise of his First Amendment rights, particularly with respect to the release of photographs and retention of negatives involving the so-called—well, the failure to enforce the law against all persons who might be violating it in Indiana and crossing over into Illinois.

(T. 721). This ruling should have been the end of Allphin's qualified immunity defense.

In granting Defendant's motion for judgment N.O.V. on the qualified immunity defense, the district court stated:

> Plaintiff contended that he was terminated in retaliation for or in restraint of his right of free speech, in that he was revealing to the press, and to co-employees, allegedly improper conduct attributable to the defendant in his official capacity. The evidence was conflicting concerning just what plaintiff's exercise of his right of free speech consisted of and just how this was interfered with by the defendant. We find that a reasonable jury could find that plaintiff was terminated in retaliation for his attempted exercise of the right of free speech, although there was no direct evidence of improper interference by defendant. A reasonable jury could also have found that the defendant's business justification for the termination was pretextual, although there was no direct evidence of that either.

C. 1-2. That too should have been the end of Allphin's qualified immunity defense.

It "blinks reality" to permit Allphin and Rummel to prevail on the basis of Benson's alleged violation of confidentiality statutes when they had, throughout the trial and for seven years prior to trial, consistently denied that Benson had made any disclosures to the press prior to his termination.

The defendants' actions were not objectively reasonable under any standard. Benson successfully overcame the Defendants qualified immunity defense both at the pretrial stages in response to several summary judgment motions and during the trial itself, at the close of Plaintiff's case in chief.

The Defendants cannot prevail in their qualified immunity defense post trial because their conduct was totally unreasonable and was in fact so shocking that the jury saw fit to award Benson $353,000.00 in damages. The defendants never claimed they fired Benson for going to the press; they claimed they fired him for a host of reasons totally unrelated to what actually happened. They concocted a story as a pretext for their actions. The jury was smart enough to see through their machinations.

Only after their plot was so soundly rejected by the jury did counsel for the defense concoct this new defense of qualified immunity on the basis of the confidentiality statutes. The defendants did not fire Benson for violating those statutes, so the confidentiality statutes are irrelevant to this case.

The defendants' motives for firing Benson were critical to the resolution of this case. *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 287 (1977). Findings as to the design, motive and intent with which men act depend pecu-

liarly upon the credit given to witnesses by the trier of fact. *U.S. v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The jury's findings in this regard are crucial to the resolution of this appeal. The decision below ignores the Seventh Amendment bar against its review of those findings by erroneously concluding that the confidentiality statutes played any role whatsoever in the defendants' motivation for terminating Benson. The district court found that the jury's findings in this regard were reasonable and therefore should have rejected Allphin's belated, pre-textual, and, under the circumstances, preposterous qualified immunity defense on the basis of the confidentiality statutes.

For the court of appeals to conclude otherwise it would have to reject the Defendants' own testimony, usurp the function of the jury and violate the Seventh Amendment in the process. See e.g. *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806, 2821 n.13 (1985).

3. In granting Allphin a new trial on both liability and damages, the lower court violated the Seventh Amendment and this Court's decisions in *Kennon v. Gilmer*, 131 U.S. 33 (1889) and in *Tennant v. Peoria and P.U. Ry. Co.*, 321 U.S. 29 (1944).

The district court did not grant Allphin's motion for a new trial. Instead it followed a bizzare approach which was ratified by the court of appeals. With regard to the new trial motion, the court stated that:

> BUT FOR Defendant's qualified immunity and the Eleventh Amendment defense, a proper remedy WOULD BE to set aside the verdicts and grant a new trial on the grounds of obvious passion and prejudice evidenced by the amount of the jury's verdicts. (emphasis supplied)

(C. 6). It then went on to state that:

> if both parties waive appeal, a consent judgment will be entered in favor of the Plaintiff for $50,000 plus attorney's fees and costs.

(C. 7). This was not the proper procedure; the appellate court should not have condoned the district court's disposition of defendant's motion in this fashion.

The Seventh Amendment reserves the determination of damages to the jury in a jury trial. It also bars review by any court of facts tried by a jury.

The courts are not free to reweigh the evidence and set aside the jury's verdicts on liability because they would have drawn different inferences or conclusions nor because the courts believed that another result was more reasonable than the jury's verdicts. *Tennant v. Peoria and P.U. Ry. Company*, 321 U.S. 29, 35 (1944).

The jury's verdict must be accepted if it is one which could reasonably have been reached. *Toth v. The Yoder Company*, 479 F.2d 1190 (C.A. 6, 1984). The district court specifically found that the jury's liability verdict was a reasonable one (C. 2).

In these circumstances, the only option open to the appellate court was to reinstate the jury's liability verdict. If a new trial was necessary at all, then it should have been limited to the question of damages as to Allphin. *Gasoline Products Company v. Champlin Refining Company*, 283 U.S. 494, 498 (1931). The jury has already determined that Allphin is liable to Benson for violating his First Amendment rights. Their factual determination in this regard is not subject to judicial review.

If the lower court believed the jury's damage award was excessive, the proper procedure would have been to give

Benson the option of a new trial in lieu of a remittitur. *Kennon v. Gilmer*, 131 U.S. 22, 27-30 (1889). While a court may set aside the verdict as excessive, it cannot fix damages unless the plaintiff is entitled to a particular amount as a matter of law. *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (C.A. 7, 1985). This was not the case here, so the district court acted improperly in trying to impose a consent judgment on the parties.

A new trial is not required on the issue of Allphin's liability. The court correctly found that Allphin is precluded from challenging the sufficiency of the evidence. (A. 14, n.14). When this fact is coupled with the district court's explicit finding that the jury's verdicts as to liability were reasonable (C. 2), the only alternative is to reinstate the liability verdict.

The trial court was less than clear as to its intentions on a new trial motion. It referred only to the excessive award of damages. It did not qualify its earlier finding as to the reasonableness of the jury's liability verdicts. (C. 2).

It is appropriate, in these circumstances, to reinstate the jury's liability verdicts and remand the case to allow the district court to set an appropriate remittitur. *McKinley v. Trattles*, 732 F.2d 1320, 1327 (C.A. 7, 1984). The appellate court failed to follow this procedure and therefore must be reversed.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 10, 1986

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2186

WILLIAM J. BENSON,

Plaintiff-Appellee,

v.

ROBERT H. ALLPHIN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77 C 3713—**Thomas R. McMillen**, *Judge.*

ARGUED APRIL 16, 1985—DECIDED MARCH 10, 1986

Before BAUER, ESCHBACH, *Circuit Judges,* and PELL, *Senior Circuit Judge.**

ESCHBACH, *Circuit Judge.* The plaintiff, a former state employee, alleged in this § 1983 action (1) that the defendant state officials discharged him in retaliation for the exercise of his First Amendment rights and (2) that, after his discharge, the defendants conspired to harass him in violation of his First Amendment rights. The primary questions presented on appeal are (1) whether the district

* Judge Pell heard oral argument and participated in the voting conference immediately following oral argument, but terminated his participation in this case on December 31, 1985.

court erred in granting a directed verdict to one of the defendant state officials on the ground that the plaintiff failed to present sufficient evidence to implicate the official in the alleged post-termination conspiracy and (2) whether the district court erred in granting a judgment notwithstanding the verdict to another state official on the ground that the official was qualifiedly immune. For the reasons stated below, we will vacate the directed verdict, vacate the judgment notwithstanding the verdict in part, and remand for a new trial on the remaining claim.

I

This appeal presents another chapter in the dispute between the plaintiff, William Benson, and certain officials of the State of Illinois. An earlier decision of this court, *Benson v. Scott*, 734 F.2d 1181 (7th Cir.) ("*Benson I*"), *cert. denied*, ____ U.S. ____, 105 S. Ct. 435 (1984), involved a related lawsuit filed against the former Illinois Attorney General and the former Illinois First Assistant Attorney General. In view of our disposition of this appeal, an extended discussion of the evidence presented at the fourteen-day trial is unnecessary. In addition, because the plaintiff is appealing from the district court's grant of a directed verdict for defendant Rummel and a judgment notwithstanding the verdict for defendant Allphin, we must review the evidence in the light most favorable to the plaintiff. *Cf. Mathews v. Fairman*, 779 F.2d 409, 415 (7th Cir. 1985).

Considering the evidence in this manner, the following facts emerge: Benson was employed by the Illinois Department of Revenue ("DOR") from 1971 until his dismissal in 1976. On November 1, 1974, Benson entered into a one-year written contract with the DOR to "undertake projects requiring personal and technical services as assigned by the [DOR] concerning pending investigations for the [DOR]." The contract was terminable at will by either party upon written notice. The parties entered into a similar contract that commenced November 1, 1975,

and expired on June 30, 1976. Benson was terminated on June 24, 1976, six days before the second contract was to expire of its own accord.

Benson was initially assigned to assist in the enforcement of the Illinois Cigarette Tax Act, codified at Ill. Rev. Stat. ch. 120, ¶¶ 453.1 to .22 (1975) and the Illinois Cigarette Use Tax Act, codified at *id.*, ¶¶ 453.31 to .51 (referred to collectively as "Tax Act" or "Act")[1] at the Illinois-Indiana border.[2] Benson lived in South Holland, Illinois, which is not far from the Indiana border, and worked out of a squad room on LaSalle Street in Chicago.

In the latter part of 1971, the DOR placed certain cigarette stands in Indiana under surveillance where it could observe individuals purchasing cigarettes and then transporting them into Illinois without paying the appropriate tax. After assuming the position of Director of the DOR in the latter part of March 1973, defendant Robert Allphin adopted a policy of arresting Tax Act violators and confiscating their vehicles. Benson and his partner, James Kelleher, were involved in the enforcement of this policy. Benson made numerous arrests. He also took photographs of individuals allegedly violating the Tax Act. These photographs were said to include pictures of Chicago police officers, Chicago firemen, and other state, county, and city employees engaged in violations of the Act. Benson retained the negatives of these photographs.

Benson maintained that, from 1974 until the time of his termination, he was ordered not to enforce the Tax Act against state, county, and city employees, especially Chicago police officers. He discussed this matter extensively with his supervisors and co-workers. In addition,

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[1] Both acts have now been consolidated as the Illinois Cigarette Use Tax Act, codified at Ill. Rev. Stat. ch. 120, ¶¶ 453.1 to .67 (1984).

[2] Benson was also involved in the enforcement of laws relating to retailer occupation taxes, motor fuel oil taxes, as well as bingo and lottery activities.

Benson informed his supervisors and co-workers that he had taken photographs of Tax Act violations and that he had retained the negatives.

Benson also criticized the DOR's tax-collection policy, and maintained that collection suits were being settled for unacceptably low amounts.[3] Apparently only Allphin and defendant Rummel (the Associate Director of the DOR) were authorized to settle these suits. Benson maintained further that certain taxpayers were making payoffs to DOR personnel in order to escape prosecution.

After Benson discussed his grievances with Allphin and Rummel in the latter part of 1975 and the early part of 1976, his duties at the DOR were changed, in that he was ostensibly assigned in January 1976 to a continuing investigation into the improprieties he had alleged were taking place within the DOR. Allphin and Rummel also told Benson to report only to them, and not to come to the DOR office in Chicago.

Allphin and Rummel instructed Benson not to reveal any investigatory information to the public. However, because he was dissatisfied with the manner in which his superiors were handling the investigation, Benson discussed his allegations with reporters from the *Chicago Tribune* and *Hammond Times* in February or March of 1976. Benson also turned over some of his photographs to a reporter in June 1976. As a result of these disclosures, several stories regarding Benson's allegations appeared in the press in March 1976; another series was published in August 1976 after Benson was terminated.

After Benson made these disclosures to the press, Allphin and Rummel tried to keep a tighter rein on him. He was again told not to discuss these matters with anyone outside the DOR. Several meetings were arranged, however, between Benson (along with other DOR person-

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[3] It should be noted that Benson was not involved in the collection of the disputed taxes.

nel) and the Internal Affairs Division of the Chicago Police Department in the spring of 1976. At these meetings, Benson was allowed to discuss the alleged selective enforcement problem and his surveillance photographs. Despite these meetings, Benson still believed that the DOR was not acting in good faith and that his superiors were attempting to cover up the allegations. In early June 1976, he indicated to DOR personnel that he might make further disclosures of his allegations to the public and press. Allphin and Rummel decided that Benson's services were no longer needed, and terminated him on June 14, 1976.

During this same period, Benson and other DOR personnel had become embroiled in federal litigation challenging the DOR's enforcement of the Tax Act. Benson was named as a defendant in several of these civil-rights actions. In addition, an Illinois state trial court in April 1974 had enjoined the enforcement of the Act at the Illinois-Indiana border against persons who purchased cigarettes for their personal consumption and not for resale. The DOR, nonetheless, continued its enforcement activities, and as a result was held in contempt in December 1975 by the Illinois state trial court. Benson had testified on behalf of the DOR at the 1975 contempt proceedings. On July 21, 1976, as his relationship with his employer was deteriorating, he filed an affidavit with the state trial-court judge. In the affidavit, he stated that he had been told by his superiors at the DOR to disregard the April 1974 injunction and to distort his testimony at the contempt hearing. Benson claimed further that DOR records had been destroyed and that others had been withheld or altered in violation of the state court's production order. He also discussed the alleged selective enforcement problem.

The Illinois Attorney General sent a letter to Allphin, dated September 2, 1976, which indicated that the State of Illinois, because of conflicts of interest, was withdrawing its representation of the DOR defendants, including Benson, in eight civil-rights suits pending in federal district courts. Allphin and Rummel decided to provide representation at the Department's expense to all DOR de-

fendants except Benson. In addition to withdrawing legal representation for Benson, Allphin and Rummel maintained a campaign of harassment against their former employee. For example, they caused information to be sent to the Social Security Administration and the Internal Revenue Service to encourage investigations of Benson. The reason for these adverse actions against Benson was Allphin and Rummel's dissatisfaction with Benson's disclosures within the DOR, to the press, and to the judiciary.

Benson filed this § 1983 action against Director Allphin and Associate Director Rummel in October 1977. Count I of the amended complaint alleged that, after Benson's termination, Allphin and Rummel conspired to harass him in retaliation for exercising his free-speech rights. Count II alleged that Benson was in fact terminated from his position at the DOR in retaliation for exercising his free-speech rights. The case finally came to trial in October 1983. The court dismissed Rummel as a defendant pursuant to his directed-verdict motion filed at the close of Benson's case-in-chief. At the close of the trial, the jury found in favor of Benson and against Allphin on both counts. It awarded Benson $350,000 for the retaliatory discharge and $3,000 for the failure to provide legal representation after the discharge. Allphin filed motions for a judgment notwithstanding the verdict and for a new trial.

The trial court issued a somewhat ambiguous order in ruling on Allphin's post-trial motions. The court first found that, on the basis of the evidence presented, a reasonable jury could conclude that Benson was terminated in retaliation for his "attempted exercise of the right of free speech" and that Allphin's proffered business justification for the termination was a pretext. The court went on to conclude that, under the Supreme Court's decisions in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983) and *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), Allphin, as a high ranking government official performing discretionary functions, was entitled to qualified immunity from civil damages. The court found that Benson was exercising his free-speech rights primarily with

reference to two matters: (1) the allegedly low settlements by the State of Illinois of large claims for delinquent sales or use taxes in contested cases brought and settled by Allphin and his legal advisors and (2) the refusal of Allphin to permit the arrest of Chicago police officers who were apparently buying cigarettes in Indiana and bringing them into Illinois without payment of the required tax. While the court acknowledged that these may be matters of public concern, it also found that their disclosure undermined Allphin's authority and control over his office.

With reference to the low settlements, the court found that Benson did not have an unqualified right to speak out on this matter and that Allphin's efforts to maintain confidentiality were required under Ill. Rev. Stat. ch. 120, ¶ 453.10b (1975). In the court's opinion, Allphin's interest in the proper functioning of his office outweighed Benson's First Amendment interests in this regard.

With reference to the selective enforcement, the court noted that Allphin allowed Benson to bring the matter to the attention of the Chicago Police Department and that the DOR took steps to remedy the problem. With reference to the disputed photographs, the judge found that these were compiled as part of an investigatory file and that Benson was not privileged to disclose them to the press. The court also relied on ¶ 435.10b to support this conclusion. According to the court, Allphin acted in the best interests of the state by requiring that Benson go to the police department, rather than the press, with these allegations.

Thus, the trial court found that Allphin had imposed reasonable restrictions on Benson's expression and also added that (although the question was never presented to the jury) there was "no evidence in the record to support a jury finding that defendant as a reasonable person under all the circumstances would have known that his termination of plaintiff's contract would violate any clearly established constitutional right."

The court then held that damages could not be recovered in this case because they were barred by the Eleventh Amendment. Under Illinois law, because there was no evidence of willful or wanton conduct on the part of Allphin, the state would be required to indemnify him. *See* Ill. Rev. Stat., ch. 127, ¶ 1302. The trial court reasoned that this was in fact a recovery of damages from the sovereign, which the Eleventh Amendment prohibits.

In considering the alternative motion for a new trial, the court found that the damage award was excessive. The trial court indicated that, but for the defendant's qualified immunity and the Eleventh Amendment's bar to recover, it would have set aside the verdicts and ordered a new trial, because the jury's decision appeared to be a product of passion and prejudice. In the court's opinion, a fair award would be $50,000 plus attorney's fees under 42 U.S.C. § 1988.[4] The court then vacated the jury's verdict and entered judgment in favor of the defendant as a matter of law. It then stated, "Alternatively, if both parties waive appeal, a consent judgment will be entered in favor of the plaintiff for $50,000 plus attorney's fees and costs." The parties, predictably enough, did not agree to such a waiver. This appeal followed.

II

A. *Motion for Judgment Notwithstanding the Verdict*

We will first consider a procedural point raised in the proceedings below. Prior to trial, the defendants filed motions for summary judgment in which they asserted a defense of qualified immunity. These motions were denied.

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[4] The trial court's opinion does not clearly indicate whether it would order a new trial on both liability and damages, or damages alone. However, both sides have interpreted the court's order as calling for a new trial on both issues, and we agree. Thus the $50,000 award (especially in view of the court's rulings on immunity and the Eleventh Amendment) appears to be no more than an indication of a reasonable settlement offer.

At the close of the plaintiff's case, the defendants moved for a directed verdict on several grounds, one of which was the defense of qualified immunity. This defense was initially rejected.[5] Counsel for Allphin, the only remaining defendant at the close of the trial, also offered a jury instruction on qualified immunity, but this instruction was properly rejected by the trial court.

Counsel for Allphin, however, failed to move for a directed verdict at the close of all evidence. The jury retired to deliberate on Friday, October 28, 1983. On Monday, October 31, 1983, Allphin's counsel attempted to make a directed-verdict motion. The district court stated that it would take the matter under advisement and "decide it after the case is finished as a post-trial motion." The court's next statement, however, was that the jury had reached a verdict on liability, but that they had not yet determined the amount of damages.

After the jury returned verdicts for the plaintiff, Allphin moved for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) and, in the alternative, for a new trial under Fed. R. Civ. P. 59(a). In his Rule 50(b) motion, Allphin again asserted a defense of qualified immunity. The district court ultimately concluded that Allphin was immune and entered a verdict in his favor.

On appeal, the plaintiff argues that the defendant's failure to move for a directed verdict at the close of all the evidence constituted a waiver under Fed. R. Civ. P. 50(b) to seek a judgment notwithstanding the verdict.[6] We disagree.

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[5] In response to the directed-verdict motion, however, the district court dismissed Rummel as a defendant on the ground that the plaintiff had not demonstrated that there had been a conspiracy.

[6] We reject Allphin's argument that he was in "technical compliance" with Rule 50(b). It would stretch the notion of liberal construction of the Federal Rules beyond recognition to conclude that Allphin was in compliance with the letter of the rule when he offered a directed-verdict motion after the jury had initiated its

(Footnote continued on following page)

Fed. R. Civ. P. 50(b) provides in relevant part:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . . [A] party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict.

Rule 50(b) is not a model of perspicuity. For example, the motion for a directed verdict mentioned in the second sentence above in fact refers to the motion described in the previous sentence. Thus, one learns from the notes of the Advisory Committee on the 1963 amendments to the rule that "[a] motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence."[7]

There are two rationales for the requirement of a motion for directed verdict at the close of all the evidence as a predicate to a motion for judgment notwithstanding the verdict. The first has its roots in the constitutional right to a jury in a civil action. Judgment by directed verdict existed in 1789; judgment notwithstanding the verdict did not. Thus, a final judgment that is contrary to the jury's verdict might run afoul of the Seventh Amendment unless it is considered a reserved decision on an earlier

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[6] *continued*
deliberations and had reached an informal verdict on liability. The district court also recognized this, and stated that it would treat the motion for directed verdict as a post-trial motion. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018 (5th Cir. 1979), is not to the contrary, as the putative directed-verdict motion in that case was made before the jury had begun to deliberate. *Id.* at 1026.

[7] A motion for directed verdict is not required as a predicate for a motion for a new trial.

motion for directed verdict.[8] *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1388 (7th Cir. 1984); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2522 (1971). The second rationale involves pragmatic concerns: the motion for directed verdict at the close of all the evidence provides the nonmovant with an opportunity to do what he can to remedy the deficiencies in his case (by for example seeking to reopen his case-in-chief, altering his cross-examination of his opponent's witnesses, or offering further evidence in rebuttal to his opponent's case) before the jury retires to deliberate. *McKinnon*, 750 F.2d at 1388; *Ohio-Sealy*, 585 F.2d at 825.[9]

The text of Rule 50(b) admits of no exceptions. However, in response perhaps to the opacity of the rule and in an effort to base its decisions on substantive grounds,

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[8] The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

For a discussion of the current scope of the jury right under the Seventh Amendment, see *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. Chi. L. Rev. 581, 606-13 (1984).

[9] Two other reasons for the requirement of a directed-verdict motion prior to a motion for judgment notwithstanding the verdict were noted in *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1024 (5th Cir. 1979). First, a litigant should not be able to gamble on a jury verdict and later challenge the sufficiency of the evidence on appeal. Second, a litigant who has not moved for a directed verdict must consider the evidence sufficient to go to the jury, and should not then impute error to the trial judge for sharing that view. These concerns are not present in the instant case, because Allphin did attempt to move for a directed verdict challenging the sufficiency of the evidence before he could have known that the jury had reached a verdict.

rather than procedural defaults, this circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict. *See, e.g., Johnson v. University of Wisconsin-Milwaukee*, No. 85-1358, slip op. at 4 (7th Cir. Jan. 29, 1986); *Bonner v. Coughlin*, 657 F.2d 931, 938 (7th Cir. 1981); *Ohio-Sealy*, 585 F.2d at 825; *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 576-77 (7th Cir. 1976). Unless Seventh Amendment questions are presented, the requirements of Rule 50(b) are not strictly enforced provided the prevailing party's failure to renew the motion for directed verdict did not unduly prejudice his opponent. *McKinnon*, 750 F.2d at 1389-90.

In the instant case, the Seventh Amendment considerations discussed above are of no moment, because the question of qualified immunity is addressed to the court, not the jury. *See Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806 (1985); *Harlow*, 457 U.S. at 818-19, 102 S. Ct. at 2738-39; *Bates v. Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984). Thus, a judgment notwithstanding the verdict on this ground in no way invades the province of the jury.[10]

As for the pragmatic considerations discussed above, Benson on appeal addressed the question of prejudice only in his reply brief to this court, where he points out that Allphin referred to the Illinois confidentiality statute, Ill. Rev. Stat. ch. 120, ¶ 453.10b (1975), for the first time in the post-trial briefs. Benson's first argument is that he was unduly prejudiced by this late reference, because he could have otherwise presented evidence to show that Allphin's reliance on the confidentiality statute was a pretext and that the statute did not apply to the materials re-

[10] It should be noted that the defense of qualified immunity is typically determined by motions under Fed. R. Civ. P. 12 or 56 and that these decisions on the immunity defense are immediately appealable. *See Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806 (1985).

leased.[11] Benson does not, however, indicate what evidence he would have presented. His second argument is that the confidentiality statute is a defense and, therefore, that it should have been raised at the pleading stage.

We disagree with both contentions. First, the issue of qualified immunity is one for the trial court, not the jury. Thus, Benson could have attempted to present his evidence regarding pretext or applicability to the trial judge. He has not indicated that he attempted to do so. In addition, the defense of qualified immunity involves an objective, not subjective, standard to analyze the actions and knowledge of the defendant. *See Harlow*, 457 U.S. 800, 102 S. Ct. 2727; *see also, Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012 (1984). Thus, an inquiry into Allphin's actual state of mind is not appropriate under *Harlow*; the only question is whether his actions were objectively reasonable. In addition, as we understand Allphin's argument concerning ¶ 453.10b, he relies on this provision only as a declaration of the State of Illinois's interest in confidentiality. This statute is a part of the "state of the law" the court will consider in determining whether the defendant is entitled to immunity.

Second, Allphin's defense is qualified immunity, not ¶ 453.10b. While it would have been preferable for Allphin to have referred to the provision prior to the post-trial briefs, we do not understand how the late citation to ¶ 453.10b could have unduly prejudiced Benson when the trial court would in any event take judicial notice of statutory enactments[12] and when the defense at issue is one that was decided by the court on the basis of the post-trial submissions of both parties.[13]

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[11] Counsel for Benson clarified this contention at oral argument, and stated that he would show that ¶ 453.10b did not cover *all* of the materials Benson released. This is, of course, an implicit concession that it did cover some of the materials.

[12] *See McCormick on Evidence* § 335 (3d ed. 1984).

[13] Benson's argument of prejudice is severly weakened by the fact that, after Allphin had mentioned ¶ 453.10b in his initial post-trial brief, Benson did not even discuss the provision in his brief in opposition.

To summarize, Allphin's failure to move for directed verdict at the close of all the evidence did not foreclose the presentation of a qualified-immunity defense in his motion for judgment notwithstanding the verdict.[14]

B. *Qualified Immunity*

As government officials performing discretionary functions, Allphin and Rummel are shielded from liability for civil damages in a § 1983 action unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738; *see also Davis*, 468 U.S. at ____ n.12, 104 S. Ct. at 3020 n.12 (immunity standard of *Harlow* applies in § 1983 actions).

Although the Supreme Court has articulated the rule for qualified immunity, it has not fully explained what it means by the phrase "clearly established statutory or constitutional rights." First, it has not specified which court one must look to in determining whether a right is "clearly established," *see Harlow*, 457 U.S. at 818 n.32, 102 S. Ct. at 2738 n.32.[15] It seems obvious, however, that reli-

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[14] As the discussion above indicates, however, Allphin is precluded from challenging the sufficiency of the evidence. In any event, Allphin has conceded that the evidence was sufficient to show that Benson was discharged for his expression.

[15] A similar problem exists in other areas of the law. For example, the federal judiciary, when interpreting legislation, has at times relied on congressional "acquiescence" or "silence" in the face of previous judicial or administrative decisions to devine the meaning of a provision. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 599, 103 S. Ct. 2017, 2033 (1983). In order to make any sense, congressional silence must be considered an analogue to an "admission by silence." *See McCormick on Evidence* § 270 (3d ed. 1984) (discussion of admission by silence). Before a party's failure to speak may be used as an admission, it must be shown that the statement was "heard" by him. *Id.* In construing congressional silence, however, the courts have not indicated the level of the judicial or administrative process Congress is "listening" to.

ance on Supreme Court decisions alone might be inappropriate (unless they are the only cases ruling on the question), because they are infrequent in comparison to the decisions of the district and appellate courts, and this infrequency could have the practical effect of converting qualified immunity into absolute immunity.[16]

Second, although it has stated that government officials are not "charged with predicting the future course of constitutional law," *Pierson v. Ray*, 386 U.S. 547, 557, 87 S. Ct. 1213, 1219 (1967), the Court has not explained how close the factual correspondence must be between the actions under consideration and the decisions that establish the applicable law. Its decision in *Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806 (1985), suggests, however, that officials are not required to anticipate the extension of existing legal principles.

These two considerations may not strongly influence the outcome of this appeal, however, because it would appear that there is one type of constitutional rule, namely that involving the balancing of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the "law" can rarely be considered "clearly established." In determining due-process requirements for discharging a government employee, for example, the courts must carefully balance the competing interests of the employee and the employer in each case. Thus, the Supreme Court has consistently stated that one can only proceed on a case-by-case basis and that no all-encompassing procedure may be set forth to cover all situations. *See, e.g., Davis*, 468 U.S. at ___, 104 S. Ct. at 3018-19; *see also Benson I*, 734 F.2d at 1184-85. It would appear that, whenever a balancing of interests is required, the facts of the existing caselaw

[16] Of course, if there is a conflict among the circuits, one must await the definitive resolution by the Supreme Court.

must closely correspond to the contested action before the defendant official is subject to liability under the *Harlow*.[17] With *Harlow*'s elimination of the inquiry into the actual motivations of the official, *see* 457 U.S. at 815-19, 102 S. Ct. at 2736-39, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.[18]

In the instant appeal, *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968), and its progeny provide the standard by which Benson's First Amendment claims as a public employee must be analyzed. In *Pickering*, the Court stated that the problem was to arrive at a balance between the interests of the plaintiff, as a citizen, in commenting on matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 568, 88 S. Ct. at 1735; *see also Connick*, 461 U.S. at 140, 103 S. Ct. at 1686. The Court was at pains to point out that, in view of the "enormous variety of fact situations" in which critical statements by public employees may be thought by their superiors to furnish grounds for dismissal, it was not "appropriate or feasible to attempt to lay down a general standard" for resolv-

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[17] As noted in *Murray v. Gardner*, 741 F.2d 434, 440 n.2 (D.C. Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1748 (1985):

> Government officials must be granted the ability to pass unmolested through bogs of murky legal precedent. They must not become prey to every hypothesis of what the law might have come to forbid had it eventually developed along certain lines. When the law is clear, and an official's duties delineated, then he will not be able to rely on the immunity defense. But we must not and do not demand that every government official become skilled in guessing the future path of the law.

Cf. Davis v. Scherer, 468 U.S. 183, ____ n.13, 104 S. Ct. 3012, 3021 n.13 (1984).

[18] There may, of course, be a situation in which the defendant's actions are so egregious that the result of the balancing test will be a foregone conclusion, even though prior caselaw may not address the specific facts at issue.

ing the free-speech claims of public employees and that it could only "indicate some of the general lines along which an analysis of the controlling interests should run." *Pickering*, 391 U.S. at 569, 88 S. Ct. at 1735. As the Supreme Court noted in *Connick*, 461 U.S. at 150, 103 S. Ct. at 1692, the particularized balancing required by *Pickering* is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual situation has not been well defined. *Cf. Connick*, 461 U.S. at 150, 103 S. Ct. at 1692.

The specific question presented in this case is whether it was clearly established in the first part of 1976 that the actions of defendants Allphin and Rummel violated Benson's First Amendment rights.[19] Benson's expressions,

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[19] As noted above, *Harlow* eliminated the inquiry into the actual motivation of government officials. The Court, however, has not explained how this objective standard is to be employed when the plaintiff's claim depends on the state of mind of the defendant officials. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S. Ct. 285, 291-92 (1976) (violation of Eighth Amendment requires showing of deliberate indifference); *Washington v. Davis*, 426 U.S. 229, 238-41, 96 S. Ct. 2040, 2046-48 (1976) (Fourteenth Amendment requires showing of discriminatory intent). *Cf. Daniels v. Williams*, ___ U.S. ___, 106 S. Ct. 662 (1986) (state official's negligent act causing unintended loss of or injury to life, liberty, or property does not implicate Due Process Clause).

The state of mind of Allphin and Rummel is important in this appeal to the extent that it bears upon the causation requirement set forth in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977). At oral argument, however, the defendants conceded that the evidence was sufficient to show that their actions were primary motivated by Benson's expressions both inside and outside the DOR.

As previously noted, the issue of qualified immunity is typically resolved before trial. The question may be decided even after a trial, in which case objective factors are still the only legitimate focus of the inquiry. *See Bates v. Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984).

for the purposes of the *Pickering* balancing test, must be divided into three categories: (1) his discussions with his co-workers and supervisors within the DOR prior to his termination, (2) his disclosures to the press prior to his termination, and (3) his disclosures to the press and others after his termination.[20]

(1) As for Benson's in-house expressions prior to his termination, this court's decision in *Egger v. Phillips*, 710 F.2d 292 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983), is controlling. In *Egger*, we stated that, until the Supreme Court's 1979 decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S. Ct. 693 (1979), it was an open question whether on-the-job expressions of public employees were entitled to constitutional

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[20] This third category relates to the claims of Count I. Allphin maintains that the denial of legal representation claim was dismissed from the case prior to trial. We disagree. The due-process claims relating to the denial of legal representation were dismissed, but not the First Amendment claims. In an order dated July 6, 1983, the trial judge to whom the case was assigned stated that the issue of the denial of representation "may still be in the case as an alleged overt act of conspiracy."

There is still some confusion as to the status of these claims at the trial. In ruling on the defendants' motion for directed verdict at the close of the plaintiff's case, the district court seemed to retain the post-termination claims, but then directed Rummel out of the case because of insufficient proof of a conspiracy. However, the claim that Benson was denied representation in retaliation for his expression was submitted to the jury. Nonetheless, the district court made no specific reference to this claim in ruling on the post-trial motions. The court stated in its ruling that Allphin did not contest the jury award for Count I, when in fact the award was contested in Allphin's post-trial motions.

We do not need to resolve this confusion in view of our rulings that (1) the directed verdict for Rummel was improper and (2) a new trial must be conducted on the claim of Count I. In addition, in view of the Supreme Court's decision in *Mitchell v. Forsyth*, ____ U.S. ____, 105 S. Ct. 2806 (1985), we will determine whether the defense of qualifed immunity is available to Allphin and Rummel for the post-termination activities. *See also Bates v. Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984).

protection. 710 F.2d at 315. *A fortiori*, constitutional protection for such expressions was not clearly established in 1976. Allphin and Rummel are, therefore, entitled to immunity under *Harlow* for those claims relating to Benson's pre-termination, in-house expression.

(2) As for Benson's disclosures to the press prior to his termination, the answer is not as straightforward, but we ultimately conclude that the defendants are immune, because it was not clearly established in the first half of 1976 that discharging an employee in Benson's position violated the First Amendment. We note that *Pickering* provides protection to public employees who are speaking out on matters of public concern.[21] There is no serious dispute that Benson's charges of wrongdoing and corruption went beyond a personal dispute about internal DOR matters, and could qualify as matters of "public concern." However, even speech involving matters of public concern can legitimately lead to adverse employment action. *See Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1258 (7th Cir. 1985). A court must consider the factors identified in the *Pickering* line of cases, *e.g.*, whether the expression would create problems in maintaining harmony among co-workers or discipline by immediate supervisors, whether the employment relationship is one for which personal loyalty and confidence are necessary, whether the expression could lead to controversy and conflict among officials, and whether the matter was one on which debate was vital to informed decisionmaking. *See, e.g., Patkus*, 769 F.2d at 1258. There are special concerns in the area of law enforcement that allow for greater restrictions on the expression of public employees. *See Zook v. Brown*, 748 F.2d 1161 (7th Cir. 1984); *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984); *Benson I*, 734 F.2d 1181; *Egger*, 710 F.2d 292. It is also important to know whether the employee's position provides him with a special ex-

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[21] The requirement that the expression be related to a matter of "public concern" was further developed in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983).

pertise on the matters at issue. *See Pickering*, 391 U.S. at 571-72, 88 S. Ct. at 1731. In addition, the presence or absence of rules, regulations, and statutes is important in striking the balance. *Cf. Connick*, 461 U.S. at 153 n.14, 103 S. Ct. at 1693 n.14; *Zook*, 748 F.2d 1161; *Jurgensen*, 745 F.2d 868; *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17 (2d Cir. 1979); *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979).

The decisions cited above, many of which were decided *after* 1976, show that it was not clearly established in 1976 that it would be improper to attempt to keep the matters Benson was discussing within the DOR and the Chicago Police Department, and, therefore, to discharge him when he made disclosures to the press.[22] An accommodation of the factors listed above is difficult for the judiciary to accomplish in a consistent manner, *Egger*, 710 F.2d at 314; it blinks reality to expect the defendants to have accomplished this task more effectively than the courts in 1976.

The conclusion that the defendants' actions were objectively reasonable is strengthened by the confidentiality provision codified at Ill. Rev. Stat., ch. 120, ¶ 453.10b (1975).[23] *Cf. Connick*, 461 U.S. at 153 n.14, 103 S. Ct. at 1693 n.14; *Zook*, 748 F.2d 1161. This statute does not conclusively determine the scope of the state's interest under

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[22] In 1976, the primary Supreme Court cases that dealt with the First Amendment rights of public employees were *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968), and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972). Both of these decisions identified, but did not extensively analyze, the employer's potential interest in confidentiality and in maintaining harmony among the employees.

[23] In 1976, ¶ 453.10b stated in relevant part:

> All information received by the [DOR] from returns filed under this Act, or from any investigation conducted under this Act, shall be confidential, except for official purposes, and any person who divulges any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law, shall be guilty of a Class B misdemeanor.

the First Amendment;[24] it does, however, represent a declaration of the state's interest, and was binding on the plaintiff and the defendants. In view of the fact that the validity of ¶ 453.10b has never been challenged, it is difficult to see how the defendants could conclude that they were violating the clearly established First Amendment rights of the plaintiff in 1976 for what amounts to insubordination in violating state law.[25] *Cf. Jurgensen*, 745 F.2d 868 (violation of regulation constitutes insubordination); *Johnson v. Brelje*, 701 F.2d 1201, 1210 (7th Cir. 1983) (no prior decisions on statute in question).

(3) As for Benson's disclosures to the press and others after his termination, our decision in *Benson I*, 734 F.2d at 1185-86, compels the conclusion that Allphin and Rummel are not entitled to immunity. In the instant case, Benson claims that he was denied legal representation as a result of his expression. It is true that Benson did not have a property interest (within the meaning of the Fourteenth Amendment) in those services. In *Benson I*, however, we concluded that, even if there is no right to a government benefit, the denial of that benefit may not be premised on an individual's exercise of his First Amendment rights. *Id.* at 1185. Furthermore, as noted in *Benson I*, the plaintiff was no longer in the employ of the DOR when he was denied legal representation. *Id.* at 1186. Thus, the interests of the state identified in *Pickering* that relate to efficiency drop out of the calculus for the most part. We conclude that, after *Benson I*, Allphin and Rummel are not immune to civil damages for those claims arising from their activities subsequent to Benson's termination.

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[24] *Cf. Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012 (1984).

[25] There are other confidentiality statutes that apply to DOR employees. *See, e.g.*, Ill. Rev. Stat., ch. 120, ¶¶ 453.50, 467.26, 478, 9-917 (1975). There are no reported court decisions in which the validity of these provisions has been placed into question.

We therefore affirm the district court's grant of judgment notwithstanding the verdict on the basis of qualified immunity for those activities of Allphin and Rummel that culminated in Benson's termination (i.e., Count II of the complaint). For those claims relating to the harassment of Benson after his termination (i.e., Count I), we find that the defendants are not immune.[26]

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[26] Some of our cases decided prior to *Mitchell v. Forsyth*, ___ U.S. ___, ___, 105 S. Ct. 2806, 2815-17 (1985), suggest that it is improper to dispose of a case solely on the ground that at the time of the alleged constitutional violation the right in question was not clearly established. Under these decisions, the court should conclusively determine whether a constitutional violation in fact occurred; otherwise, the status of such a right will be left "in limbo." *See Coleman v. Frantz*, 754 F.2d 719, 723 (7th Cir. 1985). However, *Mitchell* calls for a reconsideration of this practice, because it suggests that, once the court has determined that the official is immune, it should not go on to decide the merits of the plaintiff's claim.

This judicial restraint is, of course, consistent with the "case and controversy" requirement of Article III. Once the defendant is found to be immune from damages in an action where only damages are sought, a resolution on the merits neither aids nor hinders the parties involved in the specific case, but simply provides guidance for future litigation. Many areas of the law are rife with uncertainty, but the judiciary may not act as a roving commission that decides important questions when those questions are not properly presented in litigation.

The rationale given in the pre-*Mitchell* cases for reaching the merits was that the law would otherwise remain uncertain. Perhaps a parallel could be drawn to the "capable of repetition, yet evading review" exception to mootness. However, in the context of *Harlow*, this argument does not account for the fact that the question of qualified immunity arises when one files a *damage* action against an official in his individual capacity. The rights at issue will not necessarily "evade review," because they may be adjudicated, for example, in an action for declaratory or injunctive relief.

It is for these reasons that we express no opinion as to the merits of Benson's claims.

C. *Directed Verdict for Rummel*

At the close of the plaintiff's case-in-chief, the district court granted a directed verdict for Rummel on the ground that Benson had not shown that Rummel was involved in a conspiracy to harass Benson after his termination. Benson argues that this ruling was error, and we agree. The standard for granting a directed verdict is very generous to the nonmovant. The trial court must view the evidence and make all inferences in the light most favorable to the nonmoving party, and if reasonable jurors could differ on the conclusions drawn therefrom, the case must go to the jury. *See Mathews v. Fairman,* 779 F.2d 409, 415 (7th Cir. 1985). It is clear from our review of the record that the district court drew improper inferences in making this ruling. There was testimony presented up to that point in the trial that Rummel had been involved in the imbroglio at the DOR before and after Benson's termination and that both he and Allphin decided together not to provide legal representation to Benson after the Illinois Attorney General withdrew his representation in the civil-rights actions pending in federal district court.[27] We, therefore, vacate the grant of directed ver-

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[27] Allphin and Rummel contend on appeal that they cannot be held liable in the conspiracy alleged in Count I because Rummel was only providing legal advice to Allphin. Despite the defendants' claims to the contrary, our decision in *Lenard v. Argento,* 699 F.2d 874, 887 (7th Cir. 1983), does not hold that, as a matter of law, government attorneys are immune from liability for conspiracy in a § 1983 action.

We would, of course, be reluctant to hold that Rummel was liable if his sole role was the provision of legal advice in good faith. However, in this case the evidence strongly suggests that Rummel was acting as more than a legal advisor. In any event, the issue has not been properly presented on appeal, because Allphin and Rummel have not indicated to this court where they raised this issue below. *Cf. Graczyk v. United Steelworkers of America,* 763 F.2d 256, 261 n.6 (7th Cir.), *cert. denied,* ___ U.S. ___, 106 S. Ct. 335 (1985). We, therefore, express no opinion as to its resolution. Allphin and Rummel are free to pursue this issue on remand.

dict for Rummel, and remand for a new trial on the post-termination conspiracy in which Rummel was allegedly involved.

D. *Sovereign Immunity*

As noted in Section I, *supra*, the district court held that any damage recovery was barred by the Eleventh Amendment because, under Ill. Rev. Stat., ch. 127, ¶ 1302, Allphin would be indemnified by the state. This ruling is incorrect. As this court recently noted in *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), which dealt specifically with ¶ 1302, "every court that has considered this issue has rejected, rightly in our view, the argument that an indemnity statute brings the Eleventh Amendment into play." Thus, that amendment does not bar recovery in this action.

E. *New Trial*

The district court conditionally granted Allphin's motion for a new trial. We wholly concur in this ruling. The damages are not supported by the evidence, and the verdicts are clearly a product of passion and prejudice. *Cf. Ustrak v. Fairman*, 781 F.2d 573, 578-79 (7th Cir. 1986). Only Count I of the complaint remains, however, and we will remand for a new trial on that count on the issues of both liability and damages.

III

For the reasons stated above, we (1) AFFIRM the judgment notwithstanding the verdict for defendant Allphin on Count II on the ground that he is immune from civil damages and find that defendant Rummel is also immune under that count, (2) VACATE the judgment notwithstanding the verdict for Allphin and the directed verdict for Rummel on Count I, and (3) REMAND for a new trial on Count I on the issues of both liability and damages. The parties shall bear their own costs on appeal.

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 10, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. WILBUR F. PELL, *Senior Circuit Judge*

WILLIAM J. BENSON,

Plaintiff-Appellee,

No. 84-2186 vs.

ROBERT H. ALLPHIN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-3713

Thomas R. McMillen, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, this Court (1) AFFIRMS the judgment notwithstanding the verdict for defendant Allphin on Count II on the ground that he is immune from civil damages and finds that defendant Rummel is also immune under that count, and (2) VACATES the judgment notwithstanding the verdict for Allphin and the directed verdict for Rummel on Count I, and (3) REMANDS for a new trial on Count I on the issues of both liability and damages, in accordance with the opinion of this Court filed this date. The parties shall bear their own costs on appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 11, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*

WILLIAM J. BENSON,

Plaintiff-Appellant,

No. 84-2186 vs.

ROBERT H. ALLPHIN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 3713

Thomas R. McMillen, *Judge.*

ORDER

The opinion in the above-captioned case is amended to incorporate the following changes:

Page 5, line 11: The phrase "June 14, 1976" should read "June 24, 1976".

Page 5, beginning on line 23: The sentence "On July 21, 1976, as his relationship with his employer was deteriorating, he filed an affidavit with the state trial-court judge." should read "On July 21, 1976, after he had been terminated, Benson filed an affidavit with the state trial-court judge."

All judges on the original panel in the above-captioned case voted to deny the separate petitions for rehearing filed by the defendants-appellees and by the plaintiff-appellant.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM J. BENSON,

Plaintiff,

v. No. 77 C 3713

ROBERT H. ALLPHIN,

Defendant.

DECISION

Defendant Robert H. Allphin has filed a motion for judgment n.o.v. and has also filed an alternative motion for a new trial. Defendant is a former Director of Revenue of the State of Illinois and the plaintiff was a contract employee of that department during defendant's tenure. The complaint was based upon 42 U.S.C. § 1983 and the First Amendment to the Constitution of the United States. The jury rendered a compensatory verdict in favor of plaintiff on October 31, 1983 for $350,000. A separate verdict of $3,000 was returned for failure of defendant to provide legal counsel to plaintiff when he was sued civilly, but we do not understand this verdict to be contested.

It is undisputed that plaintiff's contract was terminated by defendant five days before it expired, after the defendant had caused an extensive investigation to be made concerning the plaintiff's activities during his employment. Plaintiff contended that he was terminated in retaliation for or in restraint of his right of free speech, in that he

was revealing to the press, and to co-employees, allegedly improper conduct attributable to the defendant in his official capacity. The evidence was conflicting concerning just what plaintiff's exercise of his right of free speech consisted of and just how this was interfered with by the defendant. We find that a reasonable jury could find that plaintiff was terminated in retaliation for his attempted exercise of the right of free speech, although there was no direct evidence of improper interference by defendant. A reasonable jury could also have found that defendant's business justification for the termination was pretextual, although there was no direct evidence of that either.

Since the evidence could support a verdict for plaintiff on the issue of liability, defendant's motion for judgment n.o.v. is based alternatively upon the qualified immunity conferred upon certain public officials, according to *Connick v. Myers*, ___ U.S. ___, 103 S.Ct. 1684 (Apr. 20, 1983); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).* On the facts of this case, we find and conclude that defendant is entitled to qualified immunity. As was said in *Connick v. Myers, supra*, at 103 S.Ct. at 1694:

> The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.

There can be no dispute that defendant Allphin was a high government official performing discretionary functions, including termination of contract employees for cause. There is no evidence that a reasonable person would believe that termination of plaintiff's employment

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* On this point and others, plaintiff's counsel has called our attention to the decision in *Wm. J. Benson v. Scott, et al.*, ___ F.2d ___ (7th Cir. #83-1040, decided May 9, 1984). This decision is instructive for many reasons, including the advantage of a full-blown trial on sensitive issues, subject to post-trial motions.

in this instance would *violate* "clearly established statutory or constitutional rights," although defendant certainly is presumed to know that employees of his department have a qualified right to exercise free speech. So far as we can determine, the subject matters concerning which plaintiff exercised his right of free speech involved (1) allegedly low settlement by the State of Illinois of large claims for delinquent sales or use taxes in contested cases brought and settled by the defendant and his legal advisors, and (2) the refusal of the defendant to permit the arrest of Chicago police officers who were apparently buying cigarettes in Indiana and bringing them into Illinois without payment of the required tax. These may be matters of public concern, but their publication could also undermine defendant's authority and control over his office.

As to the first subject, plaintiff had no unqualified right of free speech, in our opinion. He was not a lawyer and his information about the cases which had allegedly been improperly settled was both hearsay and a matter completely beyond his limited responsibilities for the department. Defendant's desire to preserve the confidentiality of his internal files was not only supported by but was required by *Ill. Rev. Stat.* ch. 120, § 453.10b. Defendant's interest in disciplining plaintiff outweighed plaintiff's rights in this respect.

As to the second subject, plaintiff was permitted by the defendant to take his complaint to the Chicago Police Department concerning alleged violations of Illinois tax laws, and as a matter of fact the Chicago Police Department took appropriate action. Considerable controversy exists in the evidence concerning plaintiff's desire to release to the press certain photographs of the unfaithful police officers. The photographs were taken during plaintiff's performance of his duties for the Department of Revenue, but the police officers (and perhaps other public employees) were not assigned to enforce the State's tax laws. As we understand plaintiff's own testimony, the photographs were to be paid for by him, subject to reimbursement. Whether or not the photographs were paid

for by the State of Illinois or by the plaintiff subject to reimbursement does not change the fact that they were investigative work which he had no privilege to disseminate to the press. In fact they were protected by § 453.10b, referred to above. Plaintiff was attempting to exercise a right of free speech which was contrary to what his superior reasonably believed was in the best interest of the State of Illinois. Therefore, the defendant was justified in requiring the plaintiff to direct his complaint to the Chicago Police Department rather than to the press.

There was no evidence that defendant restricted plaintiff's right of free speech unreasonably or contrary to the best interest of the State of Illinois. As a matter of fact, it was in the interest of the State *not* to disclose publicly the allegedly illegal activities of Chicago police officers before their Department could make its own investigation and take appropriate action. Defendant was directing plaintiff's "whistle blowing" through proper channels, not stifling it completely. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Since plaintiff was not content to let the matter be processed in the normal manner, he was properly subject to discharge based on the law as applied to undisputed evidence. *Hochstadt v. Worchester*, 545 F.2d 222 (1st Cir. 1976).

We find no evidence in the record to support a jury finding that defendant as a reasonable person under all the circumstances would have known that his termination of plaintiff's contract would violate any clearly established constitutional right.

In support of a second alternative for judgment n.o.v., the United States Supreme Court has ruled that a judgment for money damages cannot be obtained against a sovereign state or its officials acting within the scope of their responsibilities, with some exceptions. *Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 463 (1945); *Owens v. Lash*, 682 F.2d 648 (7th Cir. 1982). Although this question was not submitted to the jury, defendant was sued in his official capacity and is indemnified by

state statute, *Ill. Rev. Stat.* ch. 127, § 1302(c) and (d). The rule in *Edelman*, based on the Eleventh Amendment to the Constitution of the United States, has recently been extended to violations of State laws, practices or policies. *Pennhurst State School v. Halderman*, ____ U.S. ____, 104 S.Ct. 900 (Jan. 23, 1984).

There is no evidence of "willful or wanton misconduct" by the defendant which would deprive defendant of the indemnification of § 1302. Nor, since *Harlow v. Fitzgerald, supra*, p. 5, does there seem to be much, if any, liability remaining for "subjective" misconduct short of intentional violations.

Defendant further contends, on his motion for judgment n.o.v., that plaintiff proved no actual damages. This is the state of the evidence insofar as it concerns the failure of the State to provide plaintiff with a defense in certain civil litigation (see plaintiff's memorandum filed Dec. 12, 1983, p. 14), but it is not correct insofar as the subjective effect of the violation of a constitutional right is concerned. This is an abstract, psychological damage which must be evaluated by the jury, and if the jury properly found that the plaintiff's constitutional right to free speech was violated or impaired by the defendant, he is not limited to nominal damages. *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981). Plaintiff did testify to emotional trauma, but his physical problems which were allegedly aggravated by defendant's actions were not supported by medical evidence. We will discuss the question of damages more fully in the next section of this Decision, where we believe it is more properly involved.

Alternative Motion For A New Trial

Defendant has also filed a motion for a new trial, alternatively, primarily on the grounds of an excessive verdict. On this alternative, the court can also grant a remittitur which, if accepted by the plaintiff, would avoid the expense and risk of a new trial. *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963 (7th Cir. 1983).

This court cannot justify the amount of the jury's verdict of $350,000. Plaintiff was working on a contract for $840.00 a month which, by some legerdemain, was supposed to constitute reimbursement of his expenses. Otherwise, he would not have been entitled to his disability pay from the federal government. Even assuming that he was being compensated at the net rate of $840.00 a month before taxes, his loss of income for five days can in no respect be related to the jury's verdict of $350,000. There is no showing that his future employment was interfered with.

As mentioned above, the remainder of his damages are intangible: whatever a reasonable jury could award for interference with the right of free speech and the resulting psychological trauma which might flow from this violation of a constitutional right. These intangible damages are difficult to prove and evaluate. cf. *Nekolny v. Painter, supra.* The violation of much more personal but less transitory constitutional rights in the so-called strip-search cases with which this court and our Court of Appeals has had considerable experience (when liability had been determined as a matter of law before the jury's verdict on damages) have resulted in awards ranging from $15,000 to $60,000, and other cases are being settled by the City of Chicago for intermediate amounts, sometimes under seal. To paraphrase a well-known statement by former Supreme Court Justice Stewart, we cannot define an excessive verdict in cases involving violation of intangible con itutional rights, but we know one when we see it.

Therefore, but for defendant's qualified immunity and the Eleventh Amendment defense, a proper remedy would be to set aside the verdicts and grant a new trial on the grounds of obvious passion and prejudice evidenced by the amount of the jury's verdicts. This passion or prejudice may have resulted from the jury's belief that defendant improperly settled certain large tax claims of the State (not supported by the evidence), or that certain telephone conversations of the plaintiff were surreptitiously audited by the defendant or his subordinates (a matter not claimed

as violation of any statutory or constitutional right), or by the intensive investigation of the plaintiff's official activities upon which his discharge was allegedly based (although no complaint was made by the plaintiff of this fact, either), or by the alleged refusal to defend plaintiff in civil litigation, or by some other subtle but unobserved fact or circumstance which occurred during the trial. In short, this court can only speculate as to the cause of the excessiveness of the verdict.

In our opinion, a fair and adequate award to the plaintiff should not exceed $50,000 plus his attorney's fees which would then follow under § 1988. From what we know of this case and of the plaintiff's claimed damages, we believe that both parties should accept this as a fair settlement award.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury's verdict and the judgment on the verdict entered in this case on October 31, 1983 are vacated and set aside, and judgment is entered in favor of the defendant as a matter of law. Alternatively, if both parties waive appeal, a consent judgment will be entered in favor of the plaintiff for $50,000 plus attorney's fees and costs. A Rule 58 judgment will be entered.

ENTER:

/s/ Thomas R. McMillen
Judge
United States District Court

DATED: June 14, 1984

APPENDIX D

[1815]* UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chicago, Illinois
October 31, 1983, 10:00 O'Clock A.M.

WILLIAM J. BENSON,
Plaintiff,

-vs- Docket No. 77 C 3713

ROBERT H. ALLPHIN,
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS
R. McMILLEN, and a jury.

APPEARANCES:

For the Plaintiff:	MR. ANDREW B. SPIEGEL
For the Defendant:	MR. PAUL J. PETIT MR. PAUL F. DONAHUE
Court Reporter:	JAMES W. CHEEK

* Numbers in brackets refer to the pagination of the Official Court Reporter's transcript of proceedings.

[1816] THE CLERK: 77 C 3713, Benson vs. Allphin; motion for directed verdict.

MR. PETIT: Good morning, your Honor.

When Mr. Spiegel decided not to call those two witnesses on Friday my brain left the room with the witnesses and I forgot to make a motion for a directed verdict.

THE COURT: I was wondering if you had that in mind. I will take it under advisement and decide it after the case is finished as a post-trial motion.

MR. PETIT: Thank you, your Honor.

THE COURT: You might see the marshal. I told her to get in touch with you if a question—because the jury, when they left, said they wanted to submit a question and said, "Wait until Monday."

MR. PETIT: When they left on Friday they said that?

THE COURT: Yes. They told me—I probably should advise you—they volunteered that they had a verdict on liability on one claim but they could not decide the amount of damages. I did not ask them any question about what the claim was or what the problem was with damages. But the only reason this came up was I did ask them if they had a verdict yet because I thought if they had a verdict, I would at least get that one. But they said they only had a verdict on liability. So, I would anticipate that they would have a question on damages very shortly. That is why I asked Rudy to get in touch with you if she got the question. I * * *